STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN A. BUSH,

Plaintiff-Appellant,

v

ERIC J. BUSH,

Defendant-Appellee.

UNPUBLISHED
August 14, 2014

No. 316291
Ottawa Circuit Court
LC No. 10-067427-DM

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this action for divorce, the parties entered into a settlement agreement on the record before the trial court. Thereafter, defendant sought entry of a written judgment of divorce consistent with the settlement agreement, and plaintiff sought to set aside the settlement, claiming she had been incompetent to enter into the agreement because of extreme stress and an underlying psychological condition. The trial court denied plaintiff's motion and a consent judgment of divorce entered on May 7, 2013. Plaintiff now appeals as of right. Because the trial court did not abuse its discretion in determining that plaintiff offered her valid consent to the settlement, we affirm.

On appeal, as in the trial court, plaintiff maintains that an undiagnosed cognitive or psychological issue, when combined with increased levels of stress, rendered her incapable of agreeing to the terms of the settlement agreement. She maintains that the settlement agreement should have been set aside pending a psychological evaluation to determine whether she understood the nature of the agreement into which she entered.

Plaintiff's claim, having been raised before, addressed and decided by the trial court, is preserved for review. *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012). In reviewing plaintiff's claim, we consider the trial court's decision regarding enforcement of the settlement agreement for an abuse of discretion. See *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). Likewise, "[t]he finding of the trial court concerning the validity of the parties' consent to a settlement agreement will not be overturned absent a finding of an abuse of discretion." *Vittiglio v Vittiglio*, 297 Mich App 391, 400; 824 NW2d 591 (2012) (quotation omitted). A trial court's factual findings are reviewed for clear error. *Id.*

An agreement to settle a pending lawsuit is a contract that becomes binding once entered into on the record. See MCR 2.507(H); *In re Draves Trust*, 298 Mich App 745, 767; 828 NW2d

83 (2012). It is well-settled that, with regard to both written agreements and settlements placed verbally on the record, parties to a divorce action are bound by their settlement agreements, in the absence of fraud, duress, or mutual mistake. *Keyser v Keyser*, 182 Mich App 268, 270; 451 NW2d 587 (1990). "Relief from a property settlement or judgment is also appropriate where consent was influenced by circumstances of severe stress . . . ." *Calo v Calo*, 143 Mich App 749, 754; 373 NW2d 207 (1985). A party may not, in contrast, disavow a settlement agreement merely because he or she has experienced "a change of heart." *Vittiglio*, 297 Mich App at 399 (quotation omitted). Further, the existence of stress or an emotional disorder, alone, will not invalidate a contract. *Van Wagoner v Van Wagoner*, 131 Mich App 204, 214; 346 NW2d 77 (1983). Rather, when a party alleges that his or her consent, "while actually given, was influenced by circumstances of severe stress, the standard to be applied is that of mental capacity to contract." *Howard v Howard*, 134 Mich App 391, 396; 352 NW2d 280 (1984). This test considers "whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged." *Id.*, quoting *Star Realty, Inc v Bower*, 17 Mich App 248, 250; 169 NW2d 194 (1969).

In this case, plaintiff has ultimately failed to present evidence to support her claim that extreme stress rendered her incapable of agreeing to the terms of the settlement agreement and, accordingly, the trial court did not abuse its discretion in enforcing the settlement agreement. In particular, although it seems a fair supposition that most, if not all, divorces involve some level of stress, plaintiff offered no evidence that she in particular experienced "*severe* stress" during her divorce and the negotiations of the settlement agreement such as is necessary to justify setting aside a settlement agreement.

For example, plaintiff's affidavit explained that, after the settlement agreement was placed on the record, she began to fear that her "understanding of the settlement was incorrect." She then detailed in her affidavit those provisions of the settlement agreement that she purportedly misunderstood. Nowhere, however, did she aver that she experienced "severe stress" during the proceedings, or suggest that stress rendered her incapable of understanding the settlement agreement. Instead, at most, plaintiff's affidavit described a one-sided misunderstanding of the terms of the agreement which, by itself, does not constitute grounds for setting aside a settlement agreement. See *Hilley v Hilley*, 140 Mich App 581, 585-586; 364 NW2d 750 (1985) ("[T]his Court does not consider a unilateral mistake sufficient to modify a previously negotiated agreement.").

Plaintiff also offered the affidavit of a nurse practitioner who had "seen and/or examined" plaintiff in some capacity once a year for several years, including most recently a few weeks before the hearing at which the settlement agreement was described on the record. The nurse practitioner stated in her affidavit that her "assessments over that period include[d] depression/anxiety, chronic insomnia, and attention-deficit/hyperactivity disorder;" but she also acknowledged that plaintiff had no actual diagnoses. She further observed that plaintiff has "difficulty focusing, concentrating, listening, and comprehending" and that she "believe[d] that stress may exacerbate these difficulties." Given these observations, the nurse practitioner opined that she "was not at all surprised *if* [plaintiff] was unable to absorb and process the necessary information at the court settlement hearing" (emphasis added).

While indicative of potential psychological issues, the nurse practitioner's affidavit is rather cursory and largely speculative, ultimately failing to establish plaintiff suffered extreme stress rendering her incapable of understanding the nature and effect of the settlement agreement. That is, missing from the affidavit is again any indication that plaintiff in fact experienced extreme stress which would have exacerbated her purported psychological difficulties, or that plaintiff actually suffered an inability to understand the terms of the agreement. At best, the affidavit suggests that some unknown underlying psychological issues *might* be exacerbated *if* plaintiff is subjected to extreme stress. This does not, however, demonstrate that plaintiff experienced severe stress in connection with her divorce or that such purported stress had the actual effect of rendering plaintiff incapable of understanding the nature and effect of the settlement agreement. Absent such evidence, plaintiff's claim is unsubstantiated and she has not shown the need for further psychological evaluation or that the settlement agreement should be set aside.

Indeed, in contrast to the thin evidence presented by plaintiff, the trial court had the opportunity to personally observe plaintiff at the time the settlement agreement was read on the record and at other times in court during the course of several months of proceedings. Cf. *Van Wagoner*, 131 Mich App at 214 ("The judge did not abuse his discretion by relying more on what he saw at the trial than on the testimony of the psychiatric social worker."); *Tinkle v Tinkle*, 106 Mich App 423, 426; 308 NW2d 241 (1981) (finding no abuse of discretion in the trial court's determination that the plaintiff comprehended the settlement agreement where the trial court heard the divorce proceedings at issue). Moreover, plaintiff had the benefit of counsel's representation during the course of negotiations and the divorce proceedings, and she specifically had the opportunity to speak with counsel during the hearing at which the settlement agreement was placed on the record to ensure that she understood the terms of the agreement. Cf. *Van Wagoner*, 131 Mich App at 214 (noting with approval the plaintiff's assistance by counsel). Further, there is no indication, or even argument, that the settlement agreement placed on the record was unconscionable. See *Tinkle*, 106 Mich App at 428. Overall, on the facts of this case, the trial court did not abuse its discretion in finding plaintiff consented to the settlement agreement.

On appeal, plaintiff also challenges the trial court's imputation of income relating to calculations on the appropriate amount of child support owed by defendant. However, having determined plaintiff validly offered her consent to the judgment at issue, we decline to consider her challenges to the trial court's imputation of income. Specifically, this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . ." *Surman v Surman*, 277 Mich App 287, 293-294; 745 NW2d 802 (2007). One may not, however, appeal a consent judgment, order or decree, *Dybata v Kistler*, 140 Mich App 65, 68; 362 NW2d 891 (1985), the reason being that "the error in it, if there is any, is their own, and not the error of the court," *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958) (quotation omitted). Where a party wishes to retain the right to appeal earlier decisions and orders of the trial court, the party is expected to condition his stipulation and consent to the judgment upon the right to appeal the earlier decisions. See *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

In this case, before the parties' reached a settlement agreement, the trial court had entered an order awarding child support to plaintiff based, in part, on imputation of income to plaintiff.

Thereafter, the parties entered into a settlement agreement resolving, among other issues, the amount of child support due to plaintiff from defendant. Plaintiff, having agreed to this child support figure, cannot now attack the settlement agreement by claiming an error in the trial court's earlier imputation of income. See generally *Dora*, 351 Mich at 582. Although plaintiff maintains that she never agreed to the imputation of income, the parties were well aware of the trial court's earlier imputation of income when negotiating their settlement and they chose to adhere to that imputation when they adopted the child support in question. Had plaintiff wished for this issue to remain open for consideration on appeal, she should have reserved her right to appeal the imputation of income. See *Kocenda*, 204 Mich App at 666. Absent such reservation of a right to appeal, we need not consider plaintiff's attack on the trial court's earlier ruling. *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra